

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Initial Regulatory Flexibility Analysis)	
_____)	

**SPRINT NEXTEL CORPORATION
REPLY COMMENTS ON THE
INITIAL REGULATORY FLEXIBILITY ANALYSIS**

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September 6, 2005

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Summary

1. The *Intermodal Porting Order* does not require location portability, as rural LECs have claimed. Location portability requires a change not only in a customer's physical location, but also a change in the rate center association of the ported number. The *Intermodal Porting Order* expressly requires that the porting-in carrier maintain the number's original rate center designation following the port. Further, the Commission ensured that mobility was maintained in a LEC-CMRS port. Hence, a wireless customer's physical location is irrelevant to a LEC's number portability obligations. Moreover, a LEC's routing obligations and costs do not change based on a wireless customer's physical location.
2. The rural LECs have submitted no evidence that the *Intermodal Porting Order* imposes a significant economic impact. The high-level costs submitted in comments address the cost of providing service provider portability. However, the only economic data that is relevant to this remand proceeding is data pertaining to the additional, incremental cost of providing so-called "intermodal location portability." No rural LECs submitted such information. Moreover, it is highly doubtful that rural LECs would incur any additional incremental costs by the inclusion of intermodal location portability.
3. The "significant alternatives" identified by the rural LECs are either legally unavailable to the Commission or require no change to the *Intermodal Porting Order*. Many rural LEC comments suggest that the Commission should simply exempt rural LECs from providing intermodal portability; however, the Commission cannot legally exempt rural LECs from this statutory obligation. Rural LECs have been granted suspensions or modifications of their intermodal porting obligation by state commissions, but this "alternative" has always been available and does not require a change to the *Intermodal Porting Order*. Other rural LECs believe that installing direct connects or changing transport rules serve as "significant alternatives;" however, neither of these alternatives is legally permissible under current interconnection and traffic exchange rules. Another alternative—eliminating the intermodal location portability requirement—is notably absent from rural LEC comments because such action would provide no relief.
4. SBA's proposal that the Commission conduct a supplemental analysis is unnecessary, would harm consumers, and would undermine state decision-making. The RFA does not impose on federal agencies a duty to conduct research and the very purpose of an IRFA is to solicit comment from affected small firms so that they can provide cost estimates. State research that the SBS urges the Commission to undertake would be onerous and ultimately fruitless. Further study/analysis means further delay of intermodal porting which benefits rural LECs at the expense of consumers who have historically enjoyed few competitive alternatives.
5. Appendix A: Rural LEC comments contain a number of arguments unsupported in fact or law that are irrelevant to this remand proceeding. Rural LECs have been aware of the number portability obligation since Congress enacted the 1996 Telecom Act, yet many continue to resist this obligation. Other rural LECs comments make arguments—many of which concern unilaterally imposed porting preconditions—that the Commission has already addressed. Rural LEC comments also continue to intertwine number portability with interconnection issues and misstate the law concerning interconnection.

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Sprint Nextel Corporation (“Sprint Nextel”) hereby replies to the comments filed by the U.S. Small Business Administration, Office of Advocacy (“SBA”) and certain rural local exchange carriers (“LECs”) and their trade associations.¹

I. INTRODUCTION

This remand proceeding is highly unusual. During the appeal, USTA (now, USTelecom) argued to the appellate court that the *Intermodal Porting Order* required LECs to provide location portability in addition to service provider portability. But in making this argument, USTelecom used a definition of location portability that was incomplete and inconsistent with the Commission’s definition. USTelecom’s position on this matter had also been rejected by its own members and the North American Numbering Council (“NANC”).

Sprint Nextel demonstrates once again in Part II that the *Intermodal Porting Order* did not require LECs to provide location portability. Nevertheless, since the Commission is required

¹ See Public Notice, *Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding*, CC Docket No. 95-116, FCC 05-87, 20 FCC Rcd 8616 (April 22, 2005), *published in* 70 Fed. Reg. 41655 (July 20, 2005)(“Initial Portability Flexibility Analysis”).

to discharge the court's mandate, Sprint Nextel uses in Parts III-V the definition of "location portability" that the court utilized at USTelecom's urging. Importantly, this definition, while flawed, has no bearing on this remand proceeding because the "location portability" capability USTelecom claimed was required has no economic impact on rural LECs – let alone a "significant economic impact" on them.

Rural LECs also make numerous additional arguments in their comments. Sprint Nextel demonstrates in Appendix A that these arguments are irrelevant to this remand proceeding and that the rural LEC assertions are unsupported in fact or law or repeat arguments that the Commission has already rejected.

II. THE *INTERMODAL ORDER* DOES NOT REQUIRE LOCATION PORTABILITY AS RURAL LECS HAVE CLAIMED

The Commission has never required carriers to provide location portability, as it reaffirmed only last week.² Nevertheless, USTelecom argued to the appellate court that the *Intermodal Order* required LECs to provide location portability to wireless carriers. Sprint Nextel demonstrates below that the appellate court misapplied the term "location portability," and that, in large respect, this remand proceeding is a direct result of this misapplication of "location portability."

A. LOCATION PORTABILITY REQUIRES A CHANGE NOT ONLY IN A CUSTOMER'S PHYSICAL LOCATION, BUT ALSO A CHANGE IN THE RATE CENTER ASSOCIATION OF THE PORTED NUMBER

FCC rules define location portability as the "ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability,

² See *Hurricane Katrina LNP Waiver Order*, CC Docket No. 95-116, FCC 05-161, at ¶ 2 (Sept. 1, 2005) ("The Commission's number portability rules, however, do not extend to *location* or *service* portability.") (emphasis in original).

or convenience when moving from one physical location to another.”³ USTelecom argued on appeal that that the *Intermodal Order* required LECs to provide location portability because, if a customer ported his number to a wireless carrier and *at the same time* moved his business or residence outside the originating rate center, the customer would be “moving from one location to another.”

To be sure, a physical move outside the originating rate center is a necessary condition to location portability. But a LEC customer can move his location and keep his telephone number without implicating location portability. For example, a LEC customer can keep his existing telephone number upon moving by ordering foreign exchange (“FX”) service. In this situation, the telephone number continues to be rated in the original rate center, and the LEC customer who has moved pays the cost of transporting the call from the LEC switch in the original rate center to the LEC switch in the new rate center.

Location portability has a second — and key — component that is often overlooked. In particular, not only must a customer move his physical location, but also the rate center association of the ported number must be changed from the original rate center to the new rate center.⁴ It is the change of the rate center association of the ported number that presents so many technical challenges to telecommunications carriers.

Thus, the Commission correctly determined that the requirements in its *Intermodal Order* did not constitute location portability “because the rating of calls to the ported number stays the same:

³ 47 C.F.R. § 51.21(j).

⁴ See, e.g., Sprint Ex Parte, CC Docket No. 95-116, at 9 (Sept. 24, 2003)(“Location portability involves a change in the rate center association of a number and is generally implemented w/o any change in service provider. Wireless carriers are not asking LECs to provide location capability; they agree that a ported number will always remain rated in its original rate center.”).

[A] wireless carrier porting-in a wireline number is required to maintain the number's original rate center designation following the port. As a result, calls to the ported number will continue to be rated in the same fashion as they were prior to the port.⁵

This is no different than when a LEC customer orders FX service to keep his existing telephone number when moving to a different rate center (including a rate center served by a different LEC).

B. A WIRELESS CARRIER'S PHYSICAL LOCATION IS IRRELEVANT TO A LEC'S NUMBER PORTABILITY OBLIGATIONS

Congress wrote its number portability requirements in terms of the physical location of customers. For example, it defined service provider portability as the ability of customers to “retain, *at the same location*, existing telecommunications numbers . . . when switching from one telecommunications carrier to another.”⁶ A customer's physical location is often important with LEC networks, because they provide fixed services. In contrast, a customer's physical location often has little relevance with wireless service, because the very nature of wireless service is mobility – the ability of customers to make and receive calls while traveling from one location to another.

LECs do not know a wireless customer's physical location when their customers make a land-to-mobile call. Thus, since the inception of the wireless industry over 20 years ago, LECs have used a wireless customer's telephone number to rate a call, even though the call is routed to a wireless carrier switch that may be located in a different exchange.⁷ In other words, for their

⁵ *Intermodal Porting Order*, 18 FCC Rcd at 23708-09 ¶ 28.

⁶ 47 U.S.C. § 153(30)(emphasis added).

⁷ LECs use the same convention for land-to-land calls. For example, a LEC will rate a call to an FX customer based on the rate center association of the telephone number, not based on the FX customer's physical location. Similarly, LECs will rate calls to VoIP customers based on the number assigned to the VoIP customer, not based on that customer's physical location.

own rating purposes, LECs have used wireless numbers as a surrogate for a wireless customer's physical location.

The fact that a wireless customer enjoys terminal mobility does not convert land-to-mobile calls into location portability. Indeed, NANC rejected the very position that USTelecom argued to the appellate court. Specifically, NANC advised the FCC that intermodal porting of the sort the Commission reaffirmed in the *Intermodal Order* is not location portability:

Porting from a wireline service provider to a wireless service provider is permitted as long as the subscriber's initial rate center is within the WSP's [Wireless Service Provider's] service area With terminal mobility the [wireless] subscriber can be physically located anywhere.⁸

Further, USTelecom's *own members agreed* that wireless terminal mobility is not location portability:

Currently available wireless-wireline porting methodologies proposed in the [Wireless Wireline Integration Task Force] have met the criterion of rate center integrity within the technical limitations of LRN service provider portability.⁹

Ironically, USTelecom complained to the appellate court that the Commission failed to consult NANC in connection with intermodal portability. Although the court rejected this USTelecom argument,¹⁰ in this instance the Commission in its *Intermodal Order* did exactly what NANC agreed was required by statute and that this form of intermodal portability is not location portability.

⁸ See NANC, *Local Number Portability Administrative Working Group Report on Wireless Wireline Integration* (May 8, 1998), Appendix D – Rate Center Issue, at 35 § 6.0.

⁹ See NANC, *Local Number Portability Administrative Working Group Report on Wireless Wireline Integration* (May 8, 1998), Appendix D – Rate Center Issue, at 40 § II.B.3.

¹⁰ See *USTA v. FCC*, 400 F.3d at 42 n.26 (“[W]e do not read the first two [LNP] orders as establishing any such mandatory procedure.”).

C. A LEC'S ROUTING OBLIGATIONS AND COSTS DO NOT CHANGE BASED ON A WIRELESS CUSTOMER'S PHYSICAL LOCATION

As the examples below document, the fact that wireless customers enjoy mobility has no bearing whatsoever on how LECs route land-to-mobile calls or on the costs LECs incur in routing land-to-mobile calls.

- A. Under the Act, a rural LEC is required to permit its customers to port their numbers to wireless carriers if the customer will receive the wireless service "at the same location" where he or she had been receiving the LEC service. "Under the Act, wireless carriers can choose to interconnect indirectly" with rural LECs.¹¹ And under existing transport rules affirmed on appeal, the rural LEC is responsible for the costs of transporting its customers' calls to the wireless carrier's interconnection point in the LATA. Thus, when a rural LEC customer calls a wireless customer with a ported number, the rural LEC is obligated to deliver its customer's call to the wireless carrier's centralized interconnection point within the LATA and pay for the costs of this transport.¹² As the FCC has observed, the very same routing arrangement is used when a rural LEC customer calls a wireless customer with a non-ported number.¹³
- B. Assume that on the day following the port, the wireless customer travels to a different part of the country. The rural LEC is still required to deliver its customers' calls to this wireless customer now traveling. But importantly, the rural LECs' costs do not change in any way. Specifically, the rural LEC incurs the same network costs whether the wireless customer is located "at the same location" where he/she had been receiving the LEC's service or traveling in a different part of the country. This is because, under existing FCC rules, a rural LEC is only required to deliver land-to-mobile calls to the wireless carrier's network inside the originating LATA. If a wireless customer is traveling in a different part of the country at the time, the wireless carrier assumes the responsibility (and the cost) of locating its customers and incurring the cost of transporting the call to wherever its customer may be located.

¹¹ *Central Texas Telephone Coop. v. FCC*, 402 F.3d 205, 215 (D.C. Cir. 2005).

¹² Of course, since the wireless customer may be physically located within the rural LEC exchange ("at the same location") at the time of the call, the wireless carrier assumes the cost of transporting the call from the interconnection point to its customer being called in the rural LEC exchange.

¹³ *Intermodal Porting Order*, 18 FCC Rcd at 23709 ¶ 28 ("As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.").

- C. Assume instead that on the day following the LEC-to-CMRS port, the customer moves his/her residence/business to some location outside the rural LEC exchange area. Most wireless carriers permit their customers to keep their number when moving their residence from one location to another.¹⁴ Once again, the fact that wireless customers enjoy this flexibility has no bearing whatsoever on a LEC's costs, because the network costs it incurs in sending a land-to-mobile call to a wireless carrier that has moved outside the rural LEC's service area is the same as if the customer had never moved. As in Example B above, the rural LEC's transport obligations end at the wireless carrier's point of interconnection within the LATA.
- D. Finally, assume that at the time of the port that the customer also moves his/her residence/business to some location outside the rural LEC exchange area. This port involves both service provider portability (moving the number from a LEC to a wireless carrier) and *partial* location portability (because the customer "change[s] [his/her] residence or business location while maintaining [his/her] existing telephone number;" however, the number remains associated with the original LEC rate center¹⁵). But in routing calls to this wireless customer with a ported number, a rural LEC incurs the same transport costs it incurs in examples A, B and C above.

Thus, a wireless customer's physical location at the time of a land-to-mobile call has no bearing whatsoever on the way a LEC routes the call or on the costs it incurs in delivering the call to a wireless carrier. In other words, USTelecom's argument resulted in a remand of the case despite the fact that the remand proceeding would have no impact – technical or financial – on its members

III. RURAL LECS HAVE SUBMITTED NO EVIDENCE THAT THE *INTERMODAL ORDER* IMPOSES A SIGNIFICANT ECONOMIC IMPACT ON THEM

The Regulatory Flexibility Act requires agencies to consider whether a new rule would impose a "significant economic impact" on small businesses.¹⁶ Rural LECs contend in their comments that the provision of intermodal number portability imposes a significant economic

¹⁴ Indeed, millions of college students are doing exactly this at this very moment, as they take their local wireless number with them to college.

¹⁵ LEC Intermodal Reply Brief at 14.

¹⁶ See 5 U.S.C. § 605(b).

impact on them, and some of them submit high level costs estimates regarding the implementation of intermodal portability.¹⁷ The problem with these arguments and cost estimates is that they are completely *irrelevant* to the task that the Commission has been charged to undertake, because they do *not* address the specific question that the appellate court has remanded to it. As demonstrated below, the validity of the FCC's intermodal service provider portability rules is not at issue, and the preparation of a flexibility analysis with regard to this requirement is unnecessary and would be inappropriate. Rather, the *only* issue that has been remanded to the Commission is the preparation of a flexibility analysis with respect to the new obligation that USTelecom claims the *Intermodal Order* imposed: the provision of so-called intermodal, intraLATA "location portability."¹⁸

Section 251(b)(2) of the Communications Act imposes on "[e]ach local exchange carrier" the "duty" to provide "number portability."¹⁹ The Commission determined nearly a decade ago that this statutory obligation requires LECs to provide service provider portability, but not location portability.²⁰ The FCC further held that, "in light of Congress's mandate," it is "not necessary to engage in a cost/benefit analysis as to whether to adopt rules that require LECs to provide

¹⁷ See, e.g., MoSTCG Comments at 2-3; SBA Comments at 4-6; USTelecom Comments at 8-9.

¹⁸ The initial flexibility analysis characterizes this requirement as "porting beyond wireline rate center boundaries." Initial RFA, 70 Fed Reg. at 41658 ¶ 9. Because USTelecom on appeal and the appellate court instead used the phrase, "location portability," and because prior FCC orders used "location portability" as well, Sprint Nextel believes that clarity in analysis would be facilitated by abandoning use of the new phrase, "porting beyond the rate center." In these Reply Comments, Sprint Nextel will accede to the use of the term "location portability" as a matter of convenience; however, as noted in Section II, Sprint Nextel believes the term "location portability" is likewise being misapplied.

¹⁹ 47 U.S.C. § 251(b)(2).

²⁰ *First LNP Order*, 11 FCC Rcd 8352, 8447 ¶ 181 (1996) ("We decline at this time to require LECs to provide . . . location portability.").

[service provider] portability in the first instance.”²¹ No one – including no rural LEC – challenged the FCC’s implementing rules requiring all LECs to provide service provider portability, including to wireless carriers.²²

The Commission in its *Intermodal Order* clarified LEC porting obligations and rejected their argument that rural LECs could unilaterally impose additional preconditions on their statutory obligation to provide service provider portability to wireless carriers.²³ LECs did not challenge this ruling on appeal.²⁴ Rather, USTelecom argued that the *Intermodal Order* also required rural LECs to provide location portability, in addition to service provider portability, which it claimed, constituted a “new rule”:

The *Order* authorizes location portability – the ability of subscribers to retain their telephone numbers in *different* locations – for the first time, even though the FCC had previously refused to require location portability. . . . To deny that this constitutes location portability is to distort the words of the FCC’s prior orders beyond recognition.²⁵

²¹ *Id.* at 8361 ¶ 36. The SBA has also recognized that agencies need not consider alternatives where “uniform requirements are mandated by statute.” SBA, *A Guide for Government Agencies – How to Comply with the Regulatory Flexibility Act*, at 76 (May 2003)(“SBA Guide”). The FCC cannot ignore the policy judgments Congress makes (*e.g.*, “each” LEC should provide number portability). Accordingly, LEC assertions that the costs of service provider portability exceed the benefits are legally irrelevant. *See, e.g.*, MITS Comments at 6; MoSTCG Comments at 13; MSRI Comments at 6; NTCA/OPASTCO Comments at 10; USTelecom Comments at 2, 10 and 14.

²² Of course, the time to appeal these FCC rules has long since expired.

²³ *See Intermodal Porting Order*, 18 FCC Rcd 23697 (2003).

²⁴ *See USTA v. FCC*, 400 F.3d at 34 (Petitioners do “not challenge the merits of the order.”); *id.* at 39 (“[T]he petitioners do not challenge the substantive reasonableness of the rule.”).

²⁵ Brief of Petitioners, *USTA v. FCC*, Nos. 03-1414, 03-1443, at 17, 23, 24 (D.C. Cir., filed Aug. 30, 2004)(emphasis in original)(“LEC Intermodal Appellate Brief”). *See also* Reply Brief of Petitioners at 2 (Aug. 30, 2004)(The *Order* “indisputably enables users of telecommunications services to ‘retain existing telecommunications numbers . . . when moving from one physical location to another’” (internal citation omitted)(“LEC Intermodal Reply Brief”); *id.* at 13 (Under the *Order*, “a subscriber can maintain an existing number even when changing residences; in this way, a subscriber can achieve location portability through intermodal porting that would be

USTelecom argued that the FCC could not impose this “new” location portability obligation on rural LECs without complying with the Administrative Procedure and Regulatory Flexibility Acts.²⁶

The appellate court agreed with USTelecom that the *Intermodal Order* required rural LECs to provide intermodal location portability and that this requirement constituted a new rule:

We agree with the petitioners that the *Intermodal Order* effects a substantive change in the *First Order*. . . . The *Intermodal Order*, by contrast, requires carriers to provide users with the ability to retain their existing numbers *regardless of* [the users’] physical location. * * * In short, the *Intermodal Order* . . . effectively requires location portability, a requirement that the *First Order* had fore-sworn.²⁷

Because the Regulatory Flexibility Act requires agencies to prepare a flexibility analysis with any new rule and because the FCC had not prepared such an analysis with respect to location portability, the appellate court “remand[ed] the *Intermodal Order* to the FCC for the Commission to prepare the required final regulatory flexibility analysis.”²⁸

Thus, the only issue that is relevant in this remand proceeding is whether the requirement to provide intermodal “location portability,” as the court understood the concept, would impose a

clearly unauthorized in the case of wireline-to-wireline porting.”); *id.* at 14 (“[T]he type of location portability required by the *Order* is not simply due to the mobile nature of wireless service. This newly adopted variant of location portability also enables customers to change their residence or business location while maintaining their existing telephone numbers.”).

²⁶ See LEC Intermodal Appellate Brief at 32 (“[B]ecause the *Order* represented a significant departure from prior agency policy, imposing *new* substantive obligations, it embodies a *new* legislative rule, and the FCC was required to publish a notice of proposed rulemaking.”)(emphasis added).

²⁷ *Id.*, 400 F.3d at 35, 36 (emphasis in original).

²⁸ *USTA v. FCC*, 400 F.3d at 43. The court also ruled that the FCC was required to comply with the APA, but that its failure to do so was “plainly harmless.” *Id.* at 41.

“significant economic impact” on rural LECs.²⁹ As SBA has stated, for “the purpose of flexibility analysis, the relevant economic ‘impact’ is the impact of compliance” – in this case, compliance with the so-called “location portability” requirement that the rural LECs have claimed constituted a new rule.³⁰ Or, as USTelecom observes, the “relevant comparison is between the additional costs of number portability where not required before and the benefits to customers in those areas.”³¹

Not a single LEC commenter has submitted any facts on the incremental additional costs of providing intermodal “location portability” – that is, costs that would be incurred above those needed to provide service provider portability. It is doubtful that rural LECs would incur any additional incremental costs by the inclusion of location portability, as Sprint Nextel has previously explained:

- The switch software is the same whether rural LECs provide service provider portability only, or “location portability” in conjunction with service provider portability;
- A LEC’s porting procedures do not change whether the porting customer continues to reside within the rural LEC’s exchange or moves elsewhere in the LATA at the time of the port;
- “Location portability” queries would be made to the same LNP database as service provider portability queries;

²⁹ The Montana Small Rural Independents (“MSRI”) alone among the commenters assert that the FCC is without authority to require LECs to provide intermodal location portability. *See* MSRI Comments at 8. However, the FCC has already rejected this very argument, and no one challenged this ruling on appeal. *See First LNP Order*, 11 FCC Rcd at 8447 ¶ 182; *Second LNP Reconsideration Order*, 13 FCC Rcd 21204, 21220 ¶ 29 (1997). In fact, rural LECs did not even make this argument in their recent appeal of the *Intermodal Order*. To the contrary, they conceded the FCC possesses such legal authority. *See* LEC Intermodal Appellate Brief at 24 (“This is not to say that such an [intermodal location porting] obligation could not be imposed at all.”).

³⁰ SBA, *A Guide for Government Agencies – How to Comply with the Regulatory Flexibility Act*, at 77 (May 2003)(“SBA Guide”).

³¹ USTelecom Comments at 11 (emphasis omitted).

- Interconnection arrangements do not change if rural LECs provide intraLATA “location portability” (in addition to service provider portability) because with the indirect interconnection that is so common today, both the rural LEC and the wireless carrier connect to the LATA tandem switch;³² and
- It is highly unlikely that a rural LEC serving 1,000 or 2,000 customers would have to add any employees because it provides intermodal “location portability” in addition to intermodal service provider portability.³³

Moreover, even if rural LECs could identify “some” economic impacts by providing “location portability” in addition to service provider portability, they could not possibly demonstrate that this impact is “significant.” Rural LECs uniformly state that the demand for intermodal service provider portability is low or nonexistent.³⁴ But if demand for intermodal service provider is low, then the demand for intermodal “location portability” coupled with intermodal service provider portability necessarily must be low as well. Indeed, demand for intermodal “location portability” will only be a minuscule fraction of all requests for intermodal service provider portability – because the capability would be used only if (a) the customer ports his number to a wireless carrier, *and at the same time*, (b) moves his/her residence or business outside a rural LEC’s exchange to some other location inside the LATA.³⁵

³² The South Dakota Telecommunications Association (“SDTA”) is incorrect when it asserts that the “transport issue results from the Commission’s decision to require location portability.” SDTA Comments at 7. In fact, as the FCC correctly observed, interconnection rules are the same whether the called party uses a ported or non-ported telephone number. *See Intermodal Porting Order*, 18 FCC Rcd 23709 ¶ 28 (“As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.”).

³³ *See* Sprint Nextel Comments at 2-3.

³⁴ *See, e.g.*, MITS Comments at 5; MoSTCG Comments at 10; MSRI Comments at 6; Nebraska Companies’ Comments at 2; NTCA/OPASTCO Comments at 2 and 12-14; RIITA Comments at 2-3; SDTA Comments at 6-7; USTelecom Comments at 2 and 10.

³⁵ The FCC was very clear that a LEC’s intermodal location porting obligation is “limited to porting within the LATA.” *Intermodal Porting Order*, 18 FCC Rcd at 23709 n.75.

Sprint Nextel has previously documented that the FCC can dispense with the preparation of a final flexibility analysis if it “certifies that the [intermodal “location portability”] rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”³⁶ Rural LECs have submitted *no* evidence that their provision of intermodal “location portability”, in addition to service provider portability, will have any economic impact on them. And, given the very limited circumstances that a rural LEC customer would want to use “location portability” in conjunction with service provider portability, there is *no* situation where a rural LEC could credibly claim that the economic impact associated with additional incremental costs of intermodal “location portability” would be “significant.” Finally, the Commission cannot possibly conclude that the incremental costs of providing intermodal “location portability” would a “significant economic impact on *a substantial number of* small entities.”³⁷ It would therefore be entirely appropriate and consistent with the Regulatory Flexibility Act for the Commission to determine that the preparation of a final flexibility analysis is unnecessary.

IV. THE AVAILABLE SIGNIFICANT ALTERNATIVES REQUIRE NO MODIFICATION OF THE *INTERMODAL ORDER*

The Regulatory Flexibility Act requires the Commission to consider “significant alternatives to the rule” only if it determines that the incremental additional costs of providing intermodal location portability, as opposed to intermodal service provider only, would impose a “significant economic impact on a substantial number of small entities.”³⁸ As demonstrated above, the Commission cannot possibly make this conclusion because there is no record evidence that the incremental costs of providing intermodal intraLATA location portability would have a “signifi-

³⁶ Sprint Nextel Comments at 9-10, *quoting* 5 U.S.C. § 605(b).

³⁷ 5 U.S.C. § 605(b)(emphasis added).

³⁸ 5 U.S.C. §§ 604(a)(5), 605(b).

cant impact on a substantial number” of rural LECs. Sprint Nextel nevertheless discusses below the alternatives that the SBA and rural LECs identify in their comments, in addition to other alternatives these parties do not identify. As becomes apparent, the available significant alternatives require no change to the *Intermodal Porting Order*.

A. THE FCC IS WITHOUT LEGAL AUTHORITY TO EXEMPT RURAL LECs FROM THEIR SERVICE PROVIDER PORTING DUTY – EVEN IGNORING THAT SERVICE PROVIDER PORTABILITY IS NOT RELEVANT IN THIS REMAND PROCEEDING

The most popular “alternative” discussed in the comments is the proposal that the Commission exempt rural LECs from providing intermodal service provider portability altogether.³⁹ For example, SBA urges the FCC to “exempt small rural wireline carriers from the intermodal portability requirement.”⁴⁰ SBA apparently believes that residents in rural areas should not have the same competitive options available to their metropolitan area counterparts, even though Congress has made clear that consumers in “rural, insular, and high cost areas should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas.”⁴¹

The simple answer to this exemption proposal is that it is not relevant to this remand proceeding. The rural LEC obligation to provide intermodal service provider portability was resolved long ago.⁴² Instead, the only inquiry relevant to this proceeding is an analysis of the eco-

³⁹ See, e.g., Nebraska Companies’ comments at 2; RIITA Comments at 5; SDTA Comments at 6; USTelecom Comments at 2 and 13-14.

⁴⁰ SBA Comments at 8.

⁴¹ 47 U.S.C. § 254(b)(3).

⁴² See *Intermodal Porting Order*, 18 FCC Rcd at 23708 ¶ 26 (“In fact, the requirement that LECs port numbers to wireless carriers is not a new rule.”). See also *First LNP Order*, 11 FCC Rcd at 8355 ¶ 3 (“Number portability must be provided in these areas by all LECs to all telecommunications carriers, including commercial mobile radio services (CMRS) providers.”); *id.* at 8357 ¶ 8 (“LECs are obligated under the statute to provide number portability to customers

conomic impacts of requiring rural LECs to provide intermodal, intraLATA “location portability” – above their preexisting duty to provide intermodal service provider portability.

More fundamentally, even if it was to ignore relevance, the fact remains that the Commission lacks the authority to exempt rural LECs from a requirement imposed by Congress. As the Commission recognized long ago in rejecting the same argument now repeated by rural LECs (and SBA as well), “we find no statutory basis for excusing such a LEC from its obligations to provide number portability”:

The only statutory avenue for relief from the Section 251(b) requirements specifically for eligible LECs is to request suspension or modification of the number portability requirements under the procedure [Congress] established by Section 251(f)(2).⁴³

Rural LECs did not challenge this “no exemption authority” holding at the time, and the time for challenging it now has long passed.

Congress has empowered the Commission to “forbear from applying . . . any provision of” the Communications Act, including the statutory number portability requirement.⁴⁴ But as Sprint Nextel has already explained, it is understandable that no rural LEC has ever filed such a forbearance petition because rural LECs could not possibly meet the statutory forbearance criteria.⁴⁵ Sprint Nextel further notes that neither rural LECs nor the SBA identified in their com-

seeking to switch to CMRS carriers.”); *id.* at 8436 ¶ 160 (“The development of CMRS is one of several potential sources of competition that we have identified to bring market force to bear on the existing LECs.”); *Third LNP Order*, 13 FCC Rcd 11701, 11712 ¶ 18 (1998)(“[T]he statutory definition of number portability requires LECs to implement number portability in such a way that LEC customers can keep their telephone numbers when they switch to any other telecommunications carrier, including, therefore, when they switch to a commercial mobile radio services (CMRS) provider.”).

⁴³ *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7303 ¶ 116, 7304 ¶ 117 (1997).

⁴⁴ *See* 47 U.S.C. § 160(a).

⁴⁵ *See* Sprint Nextel Comments at 11-12.

ments forbearance as an alternative the Commission should consider.⁴⁶ Rural LECs obviously have determined that a Section 10 forbearance petition is not a significant alternative for them.

B. EXPERIENCE HAS CONFIRMED THAT THE 251(F)(2)PROCEDURE CONGRESS DEVELOPED SPECIFICALLY FOR RURAL LECs HAS SERVED ITS PURPOSE

As noted, the Commission has determined that the “only statutory avenue for relief” from the service provider portability mandate is for rural LECs to “request suspension or modification of the number portability requirements under the procedure [Congress] established by Section 251(f)(2).”⁴⁷ Nevertheless, SBA, while acknowledging that “many” rural LEC suspension petitions “have been granted,” asserts that the remedy Congress developed specifically for rural LECs is inadequate, because suspension petitions “are expensive to prepare, require costly legal representation, and do not provide certain relief.”⁴⁸

Some rural LECs disagree with SBA’s assessment. For example, the Missouri Small Telephone Company Group (“MoSTCG”) states that its suspension petition was “successful, and many state commissions granted suspension and/or modification to small rural ILECs.”⁴⁹ According to MoSTCG, one of its members was able to secure a suspension even though LNP sur-

⁴⁶ The SBA does contend that the FCC should alternatively “waive the enforcement of intermodal number portability.” However, the FCC lacks the authority to waive a substantive requirement that Congress has imposed. In fact, the FCC has been vigilant in enforcing its LNP rules because non-compliance undermines the competitive marketplace that Congress sought to establish. *See CenturyTel Consent Order*, 19 FCC Rcd 12827 (2004)(CenturyTel pays \$100,000 fine because it failed to route properly calls to wireless customers with ported numbers).

⁴⁷ *First LNP Reconsideration Order*, 12 FCC Rcd at 7304 ¶ 117. In making this observation, the FCC obviously overlooked a second statutory remedy – namely, Section 10 of the Act. *See* 47 U.S.C. § 160.

⁴⁸ SBA Comments at 7. In complaining that the State suspension procedure does “not provide certain relief,” the SBA is basically asking the FCC to exempt all rural LECs even though States, acting pursuant to a Congressional delegation and acting after the conduct of evidentiary hearings, have determined that some rural LECs should be providing portability.

⁴⁹ MoSTCG Comments at 11.

charge would have been only \$0.11 monthly⁵⁰ – a small fraction of the amount that Sprint PCS and the Sprint local telephone division had imposed on their customers.⁵¹

Similarly, Montana Independent Telecommunications Systems (“MITS”) observes that the State proceeding provided rural LECs “with a critical forum” and that the State procedure was “highly effective”:

Frankly, we do not know what we would have done without the availability of that [State] proceeding.⁵²

The Iowa Utilities Board (“IUB”), the only State commission to submit comments, observes that the statutory State suspension procedure allowed it to “consider and apply a granular analysis to the LNP deployment issue. The final result was that Iowa essentially upheld the Intermodal Order while modifying its implementation based on factors likely to have been unknown to the Commission.”⁵³ In other words, the Section 251(f)(2) procedure has worked precisely as Congress intended.

Other rural LECs – including LECs that have successfully obtained portability suspensions – take a very different view. These rural LECs characterize the procedure that Congress developed specifically for them as “inappropriate,”⁵⁴ “inefficient,”⁵⁵ “not effective,”⁵⁶ and “un-

⁵⁰ See *id.* at 3.

⁵¹ See *Sprint LNP Cost Recover Waiver Order*, 19 FCC Rcd 23952 (2004)(Sprint local telephone had been charging \$0.47 monthly).

⁵² MITS Comments at 12-13.

⁵³ IUB Comments at 6.

⁵⁴ NTCA/OPASTCO Comments at 14.

⁵⁵ *Id.* at 16.

⁵⁶ South Dakota Telecommunications Association (“SDTA”) Comments at 7. SDTA makes this “not effective” allegation even though its members have been very successful in securing suspensions. See, e.g., *Golden West Telecommunications, et al. Suspension Order*, TC05-045, 2005 S.D. PUC LEXIS 16 (Jan. 3, 2005).

desirable” because relief is “typically subject to finite limitations.”⁵⁷ Indeed, USTelecom asserts that the procedure Congress developed for rural LECs is “not an option at all” because “relief is far from certain” and because the cost of the procedure is “high, in some cases, higher even than the cost of implementing LNP.”⁵⁸ (Of course, if this were accurate, a rational rural LEC would implement LNP rather than spend more money to avoid the statutory requirement.) And, USTelecom makes these assertions even though it previously argued to the FCC that “the decision as to when a particular LEC must deploy the long-term [portability] solution might be one best made by state regulators”:⁵⁹

Permitting state commissions to determine the deployment schedule for local number portability for companies subject to the Section 251(f) provisions is necessary to preserve state authority.⁶⁰

USTelecom never explains its radical change in position.

The SBA and some rural LECs may not like the suspension procedure that Congress has developed, but the facts remain that (a) the procedure has been effective, as States have granted “many” of the rural LEC petitions;⁶¹ and (b) this Commission does not possess the legal authority to ignore (much less overrule) a procedure that Congress has adopted. In any event, it is clear that the Section 251(f)(2) suspension procedure is a “significant alternative” that is available to rural LECs, although the procedure is under the control of States rather than the FCC.

⁵⁷ Nebraska Rural Independent Companies’ Comments at 8.

⁵⁸ USTelecom Comments at 2, 11 and 12.

⁵⁹ USTA Further Reply Comments, CC Docket No. 95-116, at 6 (April 5, 1996).

⁶⁰ USTA Comments, CC Docket No. 95-116, at 3 (Sept. 27, 1996).

⁶¹ Initial Portability Flexibility Analysis, 70 Fed. Reg. at 41658 ¶ 14.

C. REQUIRING WIRELESS CARRIERS TO INSTALL A DIRECT INTERCONNECTION IS NOT A SIGNIFICANT ALTERNATIVE

The Commission in its *Intermodal Order* confirmed that rural LECs could not excuse themselves from their statutory service provider portability obligation by requiring a wireless carrier to interconnect directly with them (by establishing a “point of interconnection” at each of the 1,000-plus rural LEC networks).⁶² Although rural LECs did not challenge this FCC ruling on appeal,⁶³ SBA nonetheless now asks the FCC to “limit[] number portability to instances where there is a point of physical interconnection”:

SBA believes that the FCC could take a fresh look at requiring the physical point of interconnection as part of its RFA analysis and consider the impacts in this rulemaking.⁶⁴

There are numerous flaws with the SBA position, including:

- Two carriers will agree to use a direct interconnection when it makes sense to do so (*e.g.*, traffic volumes are large enough that a direct interconnection would be more economical than continuing with an indirect interconnection). Thus, the rule SBA wants to have the FCC adopt would force carriers to use a direct interconnection when such an interconnection is economically irrational. And, the SBA wants the FCC to impose this new requirement even though rural LEC associations have told the Commission that “[a]s a practical matter, the most feasible and cost-effective option for most rural ILECs is to use the RBOC’s tandem for transiting functions” – in other words, use indirect

⁶² *Intermodal Porting Order*, 18 FCC Rcd at 23707-08 ¶ 24, ¶ 26. Rural LECs unilaterally imposed this precondition even though the FCC had been very clear that to “provide number portability, carriers can interconnect either directly *or indirectly*.” *First LNP Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121 (emphasis added).

⁶³ *See USTA v. FCC*, 400 F.3d at 34 (Petitioners do “not challenge the merits of the order.”); *id.* at 39 (“[T]he petitioners do not challenge the substantive reasonableness of the rule.”); *id.* at 39 n.16 (“[W]e do not consider the intervenors’ argument that the *Intermodal Order* . . . assertedly changes interconnection obligations.”).

⁶⁴ SBA Comments at 7-8. Several rural LECs support this SBA proposal. *See e.g.*, John Staurulakis, Inc. (“JSI”) Comments at 11; MSRI Comments at 5-6 and 12; Nebraska Companies’ Comments at 5; NTCA/OPASTCO Comments at 19; RIITA Comments at 3.

interconnection.⁶⁵ *SBA therefore proposes to reduce the options available to rural LECs and to increase the costs rural LECs would incur* – the very antithesis of the Regulatory Flexibility Act.

- Rural LECs and wireless carriers use indirect interconnection for calls to non-porting numbers. SBA never explains why a different interconnection arrangement should apply to calls to porting numbers. In fact, SBA never explains why the FCC should abandon its prior ruling – which no LEC ever challenged – that to “provide number portability, carriers can interconnect either directly or indirectly.”⁶⁶ SBA also ignores the recent court ruling confirming that “[u]nder the Act, wireless carriers can choose to interconnect indirectly” even in a porting environment.⁶⁷
- NANC, in its report to the Commission, recognized long ago that carriers can interconnect indirectly in a porting environment.⁶⁸
- Imposing a direct interconnection obligation on both rural LECs and wireless carriers would constitute a new substantive rule. The Administrative Procedure Act (“APA”) therefore would require that the FCC first release a notice of proposed rulemaking before changing existing interconnection rules.
- Whether rural LECs and wireless carriers interconnect directly or indirectly has no relevance to this remand proceeding, which is limited in scope to the question of intermodal location portability. In fact, the Commission has determined that the type of interconnection carriers utilize is not relevant to number portability at all.⁶⁹

SBA makes its proposal under the belief that a direct interconnection “would eliminate transport costs.”⁷⁰ This SBA belief, however, is incompatible with existing FCC interconnection rules affirmed on appeal. FCC Rule 51.701(c) defines “transport” as the transmission of traffic

⁶⁵ NTCA, *Bill and Keep: Is It Right for Rural America?*, at 41 (March 2004), *appended to* NTCA Ex Parte, FCC Docket No. 01-92 (March 10, 2004).

⁶⁶ *First LNP Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121 (emphasis added).

⁶⁷ *Central Texas Telephone Coop. v. FCC*, 402 F.3d 205, 215 (D.C. Cir. 2005).

⁶⁸ See, e.g., NANC – LNP Architecture Task Force, *Architecture & Administrative Plan for Local Number Portability*, Appendix A, Scenario A3 at A-2 (“If no direct connection exists between LEC-4 and LEC-2 [the two porting carriers], calls may be terminated through a tandem agreement with LEC-1.”)/

⁶⁹ See *Intermodal Porting Order*, 17 FCC Rcd at 23713 ¶ 40 (Interconnection issues are “outside the scope of this order” because “the requirements of our LNP rules do not vary depending on how calls to the number will be routed after the port occurs.”).

⁷⁰ SBA Comments at 7.

“from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.”⁷¹ Thus, SBA’s proposal – wireless carriers should establish an interconnection point at the rural LEC’s network – would not “eliminate” a rural LEC’s transport costs because, under existing rules,⁷² a rural LEC is responsible for the transport costs of land-to-mobile traffic (just as a wireless carrier is responsible for the costs of transport for mobile-to-land traffic).⁷³

Remembering that SBA’s “direct interconnection” proposal would have practical effect only where direct interconnection is not economically justified, SBA’s proposal would actually increase the transport costs paid by both rural LECs and wireless providers. In other words, SBA proposes that the Commission through regulation needlessly increase the cost of providing telecommunications services in rural areas.

D. CHANGING EXISTING TRANSPORT COST RULES IS NOT A SIGNIFICANT (OR LEGAL) ALTERNATIVE

Another alternative discussed in the comments is the rural LEC proposal that the FCC require wireless carriers to pay all costs of transport – for both mobile-to-land and land-to-mobile

⁷¹ 47 C.F.R. § 51.701(c).

⁷² *Id.* at §§ 51.701, 51.703, 51.709.

⁷³ Indeed, the FCC explicitly explained this situation in its *Local Competition Order*, 11 FCC Rcd 15499, 16027-28 ¶ 1062 (1996)(“The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. . . . [T]he interconnecting carrier [rural LEC here] shall pay the providing carrier [the wireless carrier under SBA’s proposal] a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier.”).

traffic – so that rural LECs would then pay nothing for transport.⁷⁴ But as noted immediately above, adoption of this proposal would require a change in existing rules – and a new APA rulemaking as a result. But there is a more fundamental flaw with this rural LEC argument: such a rulemaking would be pointless because the rural LEC proposal is unlawful under the Communications Act.

Section 251(b)(1) imposes on rural LECs the “duty to establish *reciprocal* compensation arrangements for the *transport . . .* of telecommunications.”⁷⁵ Congress has defined reciprocal compensation to mean “the mutual and reciprocal recovery by each carrier of costs associated with the transport . . . on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.”⁷⁶ Current FCC rules meet this statutory standard – namely, wireless carriers pay the costs of transporting their mobile-to-land calls to rural LEC networks, while rural LECs pay the costs of transporting their land-to-mobile calls to wireless networks. In stark contrast, the rural LEC proposal – wireless carriers should pay 100 percent of all transport costs and they should pay nothing – does not entail “the mutual and reciprocal recovery” of transport costs. Accordingly, the rural LEC proposal is inconsistent with the plain commands of the Communications Act, and cannot be considered a “significant alternative” under the Regulatory Flexibility Act.

⁷⁴ See, e.g., JSI Comments at 11 and 14; MoSTCG Comments at 6 and 13; Nebraska Companies’ Comments at 6-7; NTCA/OPASTCO Comments at 19; RIITA Comments at 3; SDTA Comments at 3.

⁷⁵ 47 U.S.C. § 251(b)(5)(emphasis added).

⁷⁶ *Id.* § 252(d)(2)(A)(i).

V. SBA’S SUPPLEMENTAL ANALYSIS PROPOSAL IS UNNECESSARY, WOULD UNDERMINE STATE DECISION-MAKING, AND WOULD HARM CONSUMERS

SBA urges the Commission to prepare and “issue a supplemental IRFA with a more thorough analysis of the impacts and significant alternatives,” which would require another round of public comment.⁷⁷ This is necessary, SBA says, because the initial flexibility analysis is “not sufficient” as it does “not provide any estimates on the costs associated with handling additional ports.”⁷⁸ According to the SBA, this economic data would be “available to the Commission” if only it had “gathered” the information by reviewing the thousands of filings made in hundreds of State suspension dockets that had been established in response to hundreds of rural LEC Section 251(f)(2) suspension petitions.⁷⁹

The Regulatory Flexibility Act does not impose on federal agencies a duty to conduct research, much less review thousands of documents located in dozens of States across the country – and it is noteworthy that SBA recites no legal authority suggesting that federal agencies possess such a duty. The Act does not even require agencies to use economic data, as SBA intimates in its comments.⁸⁰ Appellate courts have confirmed for the Commission that “the RFA plainly does not require economic analysis”:

⁷⁷ See SBA Comments at 1-2 and 8.

⁷⁸ *Id.* at 3. It is noteworthy that initial flexibility analyses are not judicially reviewable, even if they are deficient – or even if an agency fails to prepare an initial analysis. See 5 U.S.C. § 611(a); *U.S. Cellular v. FCC*, 254 F.3d 78, 89 (D.C. Cir. 2001)(Court dismisses RFA appeal because FCC failed to prepare an initial flexibility analysis, noting that “the RFA expressly prohibits courts from considering claims of non-compliance with section 603.”).

⁷⁹ See SBA Comments at 4.

⁸⁰ Under the RFA, agencies are required to provide only a “description of the projected . . . compliance requirements of the proposed rule.” 5 U.S.C. §§ 603(b)(4), 604(a)(4). Congress has given agencies considerable discretion to meet this standard. Specifically, agencies may provide “a quantifiable *or* numerical description of the effects of a proposed rule *or* alternatives to the

The RFA specifically requires ‘a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule.’ Nowhere does it require, however, cost-benefit analysis or economic modeling.⁸¹

In this regard, the SBA itself acknowledges that agencies “must balance the thoroughness of an analysis and practical limits of an agency’s capacity to carry out the analysis” and that it is “well established that the RFA does not require an economic analysis.”⁸² And, in taking its “prepare a supplemental analysis” position, SBA ignores entirely that the very purpose of an initial flexibility analysis is to solicit comment from affected small firms so *they* can provide cost estimates that the agency can consider in the preparation of the final flexibility analysis.⁸³

Moreover, the State research that the SBA urges the Commission to undertake would be onerous and ultimately fruitless. The cost estimates that rural LECs submitted to their respective State commission, like the high level cost estimates that certain rural LECs included in their FCC comments, address the cost of providing service provider portability.⁸⁴ But the validity of the preexisting service provider portability rules is not in doubt; indeed, service provider portability is a statutory mandate. Rather, as discussed above, the only economic data that is relevant to this

proposed rule *or* more general descriptive statements if quantification is not practical or reliable.” *Id.* § 607 (emphasis added).

⁸¹ *Alenco Communications v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)(internal citations omitted).

⁸² *SBA, A Guide for Government Agencies – How to Comply with the Regulatory Flexibility Act*, at 31, 76 (May 2003)(“SBA Guide”). This Guide includes an initial flexibility analysis prepared by the FTC that SBA states contains a “thorough analysis of the regulation’s potential impact on small entities” even though it contains no cost estimates. *See id.* at 39-45.

⁸³ The SBA has stated that one of the purposes of an initial flexibility analysis is to “elicit[] public comments and seek[] additional economic data and information.” *Id.* at 71. *See also id.* at 48 (“The RFA mandates that agencies revise their initial regulatory flexibility analysis based on the public comments received.”).

⁸⁴ There is, moreover, a substantial question regarding the validity and reliability of the cost estimates that rural LECs have submitted. For example, MSRI provides a concrete estimate of costs for one rural LEC, but then acknowledges in a footnote that the “estimate is speculative.” MSRI Comments at 10 n.15.

remand proceeding is data pertaining to the additional, incremental costs of providing intermodal “location portability.” On this limited issue, to Sprint Nextel’s knowledge, rural LECs have submitted no cost estimates at all – whether to the FCC or with their State commissions.⁸⁵

Separate and apart from these practical considerations is the fact that the preparation of a supplemental flexibility analysis would be inconsistent with the public interest and undermine State decision-making. Congress has charged the State commissions, not the FCC, with determining, using specified federal criteria, whether rural LECs should be exempted from their portability obligation, and if so, for how long.⁸⁶ Dozens of State commissions have performed this delegated function with regard to hundreds of rural LECs, and they have often established specific dates that specific rural LECs should begin providing intermodal portability.

For example, the Iowa Utilities Board (“IUB”), after the conduct of an evidentiary hearing, “divided the 147 [Iowa rural LEC] petitioners into five groups, setting different LNP deployment schedules for each group.”⁸⁷ The IUB determined that 87 rural LECs were capable of and should begin providing intermodal portability on April 6, 2005 and that another 24 rural LECs should begin providing intermodal portability on October 6, 2005.⁸⁸ But as the IUB has correctly observed, the judicial stay of the *Intermodal Order* has “stalled implementation of local

⁸⁵ And, as Sprint Nextel demonstrates in Part III above, it is doubtful whether rural LECs will incur any additional incremental costs in providing intermodal location portability with service provider portability.

⁸⁶ See 47 U.S.C. § 251(f)(2).

⁸⁷ IUB Comments at 2.

⁸⁸ See *id.* at 4 and Attachment A.

number portability in much of Iowa” because the stay has had the practical effect of “stay[ing] the IUB’s Final Decision and Order.”⁸⁹

The judicial stay will remain in effect “until the FCC completes its final regulatory flexibility analysis.”⁹⁰ Thus, in urging the Commission to prepare yet another initial analysis, the SBA is effectively asking the FCC to extend the current court stay and in the process, further stay the decisions made by the State commissions – even though Congress determined that it should be States, and not the FCC, that determine when rural LECs should begin complying with their statutory mandate.

SBA’s supplemental analysis proposal would also harm consumers – and in particular, customers of rural LECs who have historically enjoyed few competitive alternatives. Over one million incumbent LEC customers have ported their numbers to wireless carriers during the first 17 months that intermodal porting has been available.⁹¹ The IUB has determined after the conduct of an extensive hearing that the customers of 87 Iowa rural LECs should have enjoyed this pro-competitive option five months ago.

There is, in summary, no reason for the Commission to delay the preparation and release of the final flexibility analysis. It is time that the judicial stay be lifted so rural LECs that State commissions have determined should be providing intermodal portability finally begin providing number portability.

⁸⁹ *Id.* at 2 and 4. Although the appellate court made clear that rural LECs could “voluntarily adher[e] to the *Intermodal Order* (see 400 F.3d at 43), the overwhelming majority of rural LECs have chosen not to provide any intermodal portability. See IUB Comments at 4 (“[M]ost, if not all, of the 147 Iowa petitions have delayed their plans to implement LNP.”).

⁹⁰ *USTA v. FCC*, 400 F.3d at 43.

⁹¹ See Industry Analysis and Technology Division, *Numbering Resource Utilization in the United States as of December 31, 2004*, at Table 14 (August 2005). In contrast, 16,000 wireless customers have ported their numbers to landline service. See *id.*

VI. CONCLUSION

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission take actions consistent with the views expressed above.

Respectfully submitted,

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Appendix A

SPRINT NEXTEL’S RESPONSE TO MISCELLANEOUS RURAL LEC ASSERTIONS

Sprint Nextel responds to various assertions made by rural LECs and their associations. As demonstrated below, the rural LEC comments contain many statements unsupported in fact or law – and their statements often conflict with prior FCC rulings on point.

A. USTelecom’s *Intermodal Order*/“first time” assertion. USTelecom asserts that the *Intermodal Order* “required some small carriers to implement number portability for the first time” and that the initial flexibility analysis is “deficient” because the Commission has “fail[ed] to recognize” this point.⁹² This assertion is incompatible with the facts.

Rural LECs have been aware of their number portability obligation for nearly a decade, when Section 251(b)(2), which applies to “[e]ach local exchange carrier,”⁹³ was enacted into law.⁹⁴ Moreover, the specific rule that determines the circumstances under which rural LECs must provide number portability is Rule 52.23(c), which provides:

Beginning January 1, 1999, *all* LECs must make a long-term database method for number portability available within six months after a specific request by another

⁹² USTelecom Comments at 4-5. *See also id.* at 2, 5 (two additional times), 6, 8 (twice), 10 (twice) and 14. *See also id.* at 5 (“This [first time] obligation [is one] the Commission could not easily have missed.”).

⁹³ 47 U.S.C. § 251(b)(2).

⁹⁴ *See, e.g.,* USTA Further Comments, CC Docket No. 95-116, at 5 (March 29, 1996) (“Congress in the 1996 Act “impos[ed] the duty to provide number portability on *all* LECs.”)(emphasis added); USTA Further Reply Comments, CC Docket No. 95-116, at 7 n.4 (April 5, 1996)(“The language of the act is relevant here also – LECs are obligated by Section 251(b)(2) to provide number portability. . . . Senate Report at 5 (“If requested, a local exchange carrier must take any action under its control to provide interim or final number portability as soon as it is technically feasible.”

telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.⁹⁵

The FCC adopted this rule in July 1996, over nine years ago.⁹⁶ It is Section 251(b)(2) and Rule 52.23(c) that “require” rural LECs to provide portability, not the *Intermodal Porting Order*, and rural LECs have been aware of their obligation for a long, long time.⁹⁷

B. USTelecom’s Section 251(f)(1) argument. USTelecom makes two inconsistent arguments in its comments: (a) rural LECs are not required to deploy any number portability because of their Section 251(f)(1) exemption;⁹⁸ and (b) the FCC committed legal error in requiring rural LECs to provide portability “without making any of the determinations that are statutorily required to lift the section 251(f)(1) exemption.”⁹⁹ USTelecom, however, previously told the FCC that the Section 251(f)(1) rural exemption is not relevant to number portability and that Congress “impos[ed] the duty to provide number portability on *all* LECs”:¹⁰⁰

⁹⁵ 47 C.F.R. § 52.23(c)(emphasis added).

⁹⁶ See *First LP Order*, 11 FCC Rcd 8352, 8479 (July 2, 1996). Current Rule 52.23(c) was originally codified as Rule 52.3(c).

⁹⁷ As discussed in Part II above, the D.C. Circuit agreed with rural LECs that the *Intermodal Order* required LECs to provide location portability for the first time. But it is clear from USTelecom’s comments that it is referring to service provider portability – not location portability in conjunction with service provider portability.

⁹⁸ USTelecom Comments at 6 (LNP “implementation was limited in areas served by small incumbent LECs (ILECs) because of the rural exemption in section 251(f)(1).”); *id.* at 12 n.24 (“[P]rior to the [*Intermodal*] order, these small carriers did not have to bear the cost of implementing number portability (and other measures) as long as no request was granted pursuant to the section 251(f)(1).”).

⁹⁹ USTelecom Comments at 8. See also *id.* at 9 n.18 (“These costs were incurred solely because the Commission chose not to follow the statutory precedent of placing the burden on the carrier seeking to compete in rural areas – the section 251(f)(1) exception.”).

¹⁰⁰ USTA Further Comments, CC Docket No. 95-116, at 5 (March 29, 1996)(emphasis added).

The 251(f)(1) exemption only explicitly addresses Section 251(c) obligations, and does not grant an automatic exemption from Section 251(b) obligations such as local number portability.¹⁰¹

The FCC has previously rejected these USTelecom arguments:¹⁰²

We therefore deny . . . USTA's request to “automatically exempt” rural LECs from our number portability requirements to the extent that they are exempt from the requirements of Section 251(c) under the provisions of Section 251(f)(1).¹⁰³

In so ruling, the FCC held that USTA’s position would “effectively preclude any provision of long-term number portability by rural LECs” and that USTA’s position was “contrary to Congress’s mandate that all LECs provide number portability, and Congress’s exclusion of the Section 251(b) obligations, including the duty to provide number portability, from the Section 251(f)(1) exemption for rural LECs.”¹⁰⁴

USTelecom did not challenge (*via* reconsideration or appeal) these FCC rulings at the time, it makes no attempt in its recent comments to suggest that the Commission erred in any way, and it further makes to attempt to explain its own change of position on this legal issue.

C. NTCA/OPASTCO’s Number Rating Assertion. The Commission confirmed in the *Intermodal Order* that “calls to the ported number will continue to be rated in the same fashion as they were prior to the port.”¹⁰⁵ NTCA/OPASTCO assert that the FCC’s “assumption” – namely, “a wireless carrier has a right to ‘associate’ a number with a rate center and thereby automatically ensure that calls to that number will be treated by an originating LEC as a ‘local

¹⁰¹ USTA Comments, CC Docket No. 95-116, at 2 (Sept. 27, 1996).

¹⁰² See *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7300 ¶ 110 (1997)(“USTA urges us to exempt from the deployment schedule rural LECs that are exempt from interconnection requirements under Section 251(f).”).

¹⁰³ *First LNP Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121.

¹⁰⁴ *Id.* at 7304 ¶ 119.

¹⁰⁵ *Intermodal Porting Order*, 18 FCC Rcd at 23708-09 ¶ 28.

exchange service’ call” – is “most definitely not correct with respect to two percent carriers.”¹⁰⁶ NTCA and OPASTCO, however, recite no authority or explanation for their position.

Under FCC number assignment rules, a wireless carrier (or any other telecommunications carrier) may obtain telephone numbers in any LEC rate center where it “is or will be capable of providing service within sixty (60) days of the numbering resources activation date.”¹⁰⁷ In this regard, the Commission has noted that wireless carriers obtain “as many NXX codes as are required to permit wireless customers to be called by wireline customers on a local basis.”¹⁰⁸ Thus, contrary to NTCA/OPASTCO’s belief, wireless carriers do have the right to “associate” a number with a rural LEC rate center and thereby ensure that calls to that number will be treated as local.¹⁰⁹

This proceeding, however, involves ported numbers (as opposed to numbers a wireless carrier obtains directly from the number administrator). If a call to a particular number served by a LEC is local, that call necessarily will remain local if the called party ports the number to a wireless carrier. After all, the Commission has recognized the “standard industry practice” whereby LECs “compare the NPA/NXX codes of the calling and called parties to determine the

¹⁰⁶ NTCA/OPASTCO Comments at 5. Similarly, the Texas Rural Carriers assert that the FCC’s routing and rating “assumption” is “not necessarily correct” and “not necessarily true.” Texas Rural Carriers Comments at 7-8.

¹⁰⁷ 47 C.F.R. § 52.15(g)(2)(ii). *See also id.* § 52.15(g)(3)(describing circumstances when carrier can obtain additional numbers “for the rate center”).

¹⁰⁸ *Numbering Resource Optimization*, 14 FCC Rcd 10332, 10370-71 ¶ 112 (1999). *See also id.* at 10371 n.174 (“[T]o enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residence of end-users.”).

¹⁰⁹ Because wireless carriers obtain numbers only in LEC rate centers where they provide wireless services, wireless numbers cannot legitimately be characterized as “‘virtual’ NXXs.” *See Texas Rural Carriers Comments at 7.*

proper rating of a call.”¹¹⁰ Courts have also held that wireless carriers would be placed at “a competitive disadvantage” if LECs changed their local rating and dialing practices to discriminate against wireless carriers by preventing wireless customers from receiving “local calls from many of the independent telephone companies’ landline subscribers.”¹¹¹ Besides, FCC local dialing parity rules are clear in specifying that a LEC “shall permit” its customers to dial “the same number of digits to make a local telephone call notwithstanding the identity of the . . . called party’s telecommunications service provider.”¹¹²

In summary, the NTCA/OPASTCO assertion – the FCC misstated the law regarding a wireless carrier’s right to obtain locally rated telephone numbers and a LEC’s corresponding obligation to honor those local numbers – is unfounded.

D. NTCA/OPASTCO’s Rating and Routing Example. NTCA and OPASTCO provide in their joint comments a specific example involving a rural LEC, “ABC Telephone,” and a wireless carrier, “Big National Wireless,” that they say “illustrates the problems inherent with the FCC’s current rules.”¹¹³ There are fundamental problems with this example and, in fact, the ex-

¹¹⁰ *Unified Intercarrier Compensation Further NPRM*, FCC 04-33 at ¶ 41 (March 4, 2005) (“[A] call is rated as local if the called number is assigned to a rate center within the local calling area of the originating rate center. If the called number is assigned to a rate center outside the local calling area of the originating rate center, it is rated as a toll call.”). Under the Communications Act, a call is treated as local or toll based on the physical location of the calling and called parties – not the point of interconnection between the two local carriers. *See* 47 U.S.C. §§ 153(47), (48).

¹¹¹ *Atlas Telephone v. Oklahoma Corporation Comm’n*, 309 F. Supp. 2d 1313, 1317 (W.D. Ok. 2004), *aff’d* 400 F.3d 1256 (10th Cir. 2005).

¹¹² 47 C.F.R. § 51.207. *See also* 47 U.S.C. § 251(b)(3); *Second Local Competition Order*, 11 FCC Rcd 19392, 19429 ¶ 68 (1996)(FCC “rejects” LEC assertion that the “section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers.”).

¹¹³ *See* NTCA/OPASTCO Comments at 7-9.

ample actually confirms that rural LECs can properly rate and route calls to wireless customers with ported numbers.

There are two problems with the example. First, NTCA/OPASTCO would have the Commission believe that a rural LEC customer (Mr. Jones in the example) would switch his local residential telephone service to a wireless carrier even though the wireless carrier does not provide coverage at his residence. Sprint Nextel submits that it is highly unlikely that a LEC residential customer would port his or her number to a wireless carrier that provides no coverage at the house.

Second, the NTCA/OPASTCO example assumes that the wireless carrier interconnects with the public switched network (*via* Type 2A interconnection) in a LATA that is different from the one where the rural LEC (ABC Telephone in the example) is located.¹¹⁴ However, the FCC has been very clear that a LEC's porting requirements are "limited to porting within the LATA where the wireless carrier's point of interconnection is located, and does not require or contemplate porting outside of LATA boundaries."¹¹⁵ Thus, under the specific facts that NTCA/OPASTCO provide, the rural LEC (ABC) would not be required to port Mr. Jones' number.

In addition, the NTCA/OPASTCO example confirms that rural LECs can properly route calls to wireless customers with ported numbers – even if the rural LEC and wireless carrier do not connect directly with each other. Although NTCA/OPASTCO state that there is no "established routing path" between ABC's network and Big National Wireless' network (and their diagram shows only an IXC's facilities connecting the rural LEC network to the BOC tandem

¹¹⁴ See NTCA/OPASTCO Comments at 8 ("This [CMRS] POI is outside the BOC LATA in which ABC is located.").

¹¹⁵ *Intermodal Porting Order*, 18 FCC Rcd 23697, 23709 n.75 (2003).

switch), in point of fact, every rural LEC network is connected to a LATA tandem switch, as NTCA has previously recognized:

Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier. . . . As a practical matter, the most feasible and cost-effective option for most rural ILECs is to use the RBOC's tandem for transiting functions.¹¹⁶

Indeed, NTCA/OPASTCO readily acknowledge that if a neighbor who lives on the same street (Mr. Smith in the example) calls Mr. Jones at his ported number, the rural LEC would route the local call “via a tandem switch” over facilities that NTCA/OPASTCO did not include in their diagram:

The [rural LEC] switch will look for a trunk to switch the call to, but will not find a direct connection, since Big Corp. does not have an established interconnection arrangement with ABC. At this point, Mr. Smith's call will likely be completed as dialed, but will be routed via a tandem switch. . . .¹¹⁷

The example further confirms that rural LECs can properly rate calls to wireless customers with ported numbers. As NTCA/OPASTCO recognize, the rural LEC customer originating the call (Mr. Smith in the example) would dial seven digits because he “assumes that the call [to

¹¹⁶ NTCA, *Bill and Keep: Is It Right for Rural America?*, at 41 (March 2004), *appended to* NTCA Ex Parte, FCC Docket No. 01-92 (March 10, 2004).

¹¹⁷ NTCA/OPASTCO Comments at 8. NTCA/OPASTCO further suggest that the neighbor's call might alternatively be routed “directly to Mr. Smith's prescribed IXC, who will, in turn, bill him the associated toll charges for transporting the call to Big Corp.” *Id.* at 8-9. This supposed IXC routing would not occur. The calling neighbor (Mr. Smith) dials seven digits because he “assumes that the call [to Mr. Jones on his ported number] continues to be local” (*id.* at 8), and the FCC has ruled that calls to ported numbers “will continue to be rated in the same fashion as they were prior to the port.” *Intermodal Porting Order*, 18 FCC Rcd at 23708-09 ¶ 28. It would therefore be improper for the rural LEC to route a local call to an IXC and to force a calling customer to pay toll charges without any notice that toll charges would be incurred. LECs use “1+” dialing to advise their customers they are about to make a toll call rather than a local call. The rural LEC in this example, however, cannot use the “1+” convention because the local dialing parity rule specifies that a LEC “shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.” 47 C.F.R. § 51.207.

Mr. Jones on his ported number] continues to be local.”¹¹⁸ A call dialed with seven digits is a local call. The NTCA/OPASTCO example thus confirms that rural LECs can properly rate and route land-to-mobile calls to wireless customers with ported numbers even if the LEC and wireless carrier interconnect indirectly through a LATA tandem switch.

E. NTCA/OPASTCO’s Technically Infeasible Assertion. NTCA/OPASTCO alone among the commenters assert that it is “technically infeasible for two percent carriers to comply fully with the requirements of the Intermodal LNP Order.”¹¹⁹ Indeed, they claim that “[n]o evidence has been entered into the record of this proceeding to suggest otherwise.”¹²⁰

NTCA/OPASTCO make this assertion even though the Commission has specifically held that there is “no technical obstacle to porting wireline numbers to wireless carriers whose point of interconnection is outside the rate center of the ported numbers.”¹²¹ NTCA/OPASTCO make their generalized assertion even though the Commission stated that it will not entertain claims of technical infeasibility without the submission of “*specific evidence* that porting to a wireless carrier . . . is not technically feasible.”¹²² And finally, NTCA/OPASTCO make their assertion even though their own “ABC Telephone/Big National Wireless” example confirms that intermodal porting with proper rating and routing is technically feasible.

¹¹⁸ NTCA/OPASTCO Comments at 8.

¹¹⁹ NTCA/OPASTCO Comments at 5. *See also id.* at 2. In contrast, MSRI asserts that the provision of intermodal porting is only “technically uncertain.” MSRI Comments at 3.

¹²⁰ NTCA/OPASTCO Comments at 6.

¹²¹ *Intermodal Porting Order*, 18 FCC Rcd at 23706 ¶ 23.

¹²² *Id.* at 23707 ¶ 23 (emphasis added).

F. NTCA/OPASTCO’s “FCC Has Never Decided” Assertion. NTCA/OPASTCO claim that the FCC has never determined who pays the cost of transport for land-to-mobile calls.¹²³ NTCA makes this assertion even though it told the FCC only last year that “the carrier that originates the call will pay for the transiting function.”¹²⁴ In fact, as discussed in Part III above, the FCC long ago adopted rules pertaining the responsibility for paying transport costs, and those rules were also affirmed on appeal long ago.

G. The Missouri LEC Local Rating/Transport Cost Argument. The Missouri Small Telephone Company Group (“MoSTCG”) contends that if wireless carriers “want to have ‘local’ numbers in a small ILEC’s exchange area without establishing any facilities, then wireless carriers should make and pay for their own arrangements to transport the calls to their distant locations.”¹²⁵ The MoSTCG, however, cites no authority nor provides any explanation for its position.

The FCC’s number assignment rules quoted above give a wireless carrier the right to obtain locally rated telephone numbers so long it “is or will be capable of providing service” in a LEC’s service area. This rule does not additionally require the wireless carrier to pay for LEC transport as a condition to obtaining locally-rated numbers. The requirement that the MoSTCG advocates would, moreover, conflict directly with the plain commands of Section 251(b)(5) which imposes on rural LECs the duty to establish “*reciprocal* compensation arrangements for

¹²³ See NTCA/OPASTCO Comments at 18 (“Neither the Commission nor the industry has determined who pays for the transport of traffic to a transiting carrier’s facilities when a two percent carrier’s customer calls a person physically located in the same rate center, but who has ported his or her number to a wireless carrier without a point of presence in the rate center.”).

¹²⁴ National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?*, at 40 (March 2004), *appended to* NTCA Ex Parte, FCC Docket No. 01-92 (March 10, 2004).

¹²⁵ MoSTCG Comments at 7.

the *transport . . . of telecommunications.*”¹²⁶ Specifically, the MoSTCG position would result in a non-reciprocal arrangement because, under their position, wireless carriers would be responsible for all transport costs – for both mobile-to-land and land-to-mobile calls – while rural LECs would pay nothing in transport costs.

H. The Iowa and Montana LEC Lack of LNP Symmetry Assertion. The Rural Iowa Independent Telephone Association (“RIITA”) asserts that unspecified “FCC orders . . . discriminate against rural independent wireline carriers because the FCC does not require the very same wireless carriers to port to wireline carriers.”¹²⁷ The Montana Small Rural Independents (“MSRI”) similarly claim that the FCC “failed to require wireless carriers to port numbers to wireline carriers under the same conditions”:

This lack of a “reciprocal” LNP requirement applicable to wireless carriers results in a severe competitive disadvantage to rural carriers. That is, customers cannot switch their numbers from wireless to wireline carriers. . . . This situation is extremely anti-competitive.¹²⁸

These allegations, entirely unsupported, are inconsistent with the facts. The FCC explicitly stated in its *Intermodal Order* that it “reaffirm[s] that wireless carriers must port numbers to wireline carriers within the number’s originating rate center.”¹²⁹ Thus, the porting obligations

¹²⁶ 47 U.S.C. § 251(b)(5)(emphasis added).

¹²⁷ RIITA Comments at 3.

¹²⁸ MSRI Comments at 6-7.

¹²⁹ *Intermodal Porting Order*, 18 FCC Rcd at 23706 ¶ 22. *See also LNP Stay Denial Order*, 18 FCC Rcd 24664 at ¶ 6 (2003)(“[I]ntermodal number portability is a two-way obligation.”); *USTA v. FCC*, 400 F.3d at 33 n.7 (“The order also required wireless carriers to port numbers to wireline carriers.”). Also completely baseless is MSRI’s additional assertion that if a LEC customer “switch[es] to a wireless carrier they could not later change their mind and switch their number back to a wireline carrier. MSRI Comments at 7. *See, e.g., LNP Stay Denial Order*, 18 FCC Rcd 24664 at ¶ 6 (2003)(“Indeed, wireline carriers can point in some number of wireless numbers today.”); *Second LNP Order*, 12 FCC Rcd 12281, 12326 ¶ 79 (1997)(“[W]hen a ported telephone number is disconnected, that telephone number [is] released or ‘snapped-back’ to the original service provider assigned the NXX.”); *Alltel Emergency Request*, 16 FCC Rcd 19197,

that the Commission has imposed on both LECs and wireless carriers are fully reciprocal and symmetrical.

I. The Missouri LEC Rural Investment Assertion. The Missouri Small Telephone Company Group (“MoSTCG”) additionally claims that the *Intermodal Order* “create[s] a disincentive for wireless carriers to make investments in rural areas”:

In essence, this would allow large national wireless carriers to cream skim rural Missouri customers without making any investment in rural Missouri.¹³⁰

A rural LEC customer would be interested in porting his or her number only if the wireless carrier provides service at the customer’s business or residence. Indeed, the *Intermodal Order* expressly provided that a rural LEC must port a number only when the wireless carrier’s “‘coverage area’ overlaps the geographic location in which the customer’s wireline number is provisioned.”¹³¹

To provide service to a rural LEC customer, a wireless carrier must have a cell site in the vicinity (to communicate with the customer’s handset). In addition, the wireless carrier must connect that cell site to its mobile switching office (“MSC”), and in rural areas in particular, wireless carriers generally have no choice but to purchase the DS-1 facilities that the rural incumbent provides – at whatever price the LEC establishes (given the absence of competitive trunk facilities in rural areas). There is, therefore, no basis whatsoever to MoSTCG’s assertion that wireless carriers will “cream skim” rural customers “without making any investment in rural” America.

19198 ¶ 3 (2001)(“The 5,100 numbers the customer is currently using were ported to Alltel from the incumbent LEC, and these numbers will ‘snap back’ to the incumbent LEC when relinquished by the customer.”).

¹³⁰ MoSTCG Comments at 12.

¹³¹ *Intermodal Porting Order*, 18 FCC Rcd at 23698 ¶ 1.

J. The Montana LEC “FCC LNP Cost Recovery Rules Are Unfair” Argument. The Montana Small Rural Independents (“MSRI”) claim that the FCC’s cost recovery rules for LEC implementation of number portability are unfair and incompatible with cost-causation principles:

The Commission’s rule regarding recovery of LNP implement costs requires that all *remaining wireline* customers (i.e., the customers that do *not* port their numbers) must pay the *entire* cost of implementation. . . . This is directly inconsistent with the basic public utility ratemaking principle that the “cost causer” should directly pay the costs incurred to provide a service.¹³²

In making its argument, however, MSRI overlooks that Congress explicitly directed that portability costs be recovered “on a competitively neutral basis as determined by the Commission.”¹³³ Moreover, MSRI neglects to mention in its comments that the Commission has already considered – and repeatedly rejected – MSRI’s argument:

Ordinarily the Commission follows cost causation principles, under which the purchaser of a service would be required to pay at least the incremental cost incurred in providing that service. With respect to number portability, Congress has directed that we depart from cost causation principles if necessary in order to adopt a “competitively neutral” standard, because number portability is a network function that is required for a carrier to compete with the carrier that is already serving a customer. Depending on the technology used, to price number portability on a cost causative basis could defeat the purpose for which it was mandated.¹³⁴

It is important for the Commission to understand precisely what MSRI is proposing. According to MSRI, the LNP implementation costs of one of its members, Ronan Telephone, is \$72,220.¹³⁵ Thus, according to MSRI, if only one Ronan customer ports his number in the first

¹³² MSRI Comments at 9 (emphasis in original).

¹³³ 47 U.S.C. § 251(e)(2).

¹³⁴ *First LNP Order*, 11 FCC Rcd at 8419 ¶ 131. *See also Third LNP Reconsideration Order*, 17 FCC Rcd 252, 269 ¶ 35 (2001); *Numbering Resource Optimization*, 15 FCC Rcd 7574, 7665 ¶ 200 (2000); *Fourth LNP Reconsideration Order*, 14 FCC Rcd 16459, 16475 ¶ 27, 16480 ¶¶ 35-36 (1999); *Third LNP Order*, 13 FCC Rcd 11701, 11726-27 ¶ 41 (1998).

¹³⁵ *See* MSRI Comments, Exhibit No. 1. MSRI does caution, however, that this is a “hypothetical estimate” only. *Id.*

year of LNP,¹³⁶ that customer (or the wireless carrier) would be required to Ronan \$72,220 as a precondition to porting.

K. The Montana LEC “Don’t Require Us to Provide LNP Without a Request” Argument.

The Montana Small Rural Independents (“MSRI”) also ask the Commission to “reaffirm” that in “areas without any wireless service, it serves absolutely no logical purpose to require a small company to implement LNP, since there is no wireless provider in the area.”¹³⁷ While Sprint Nextel does not oppose this request *per se*, the request is completely unnecessary given the clarity of the governing rule:

Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.¹³⁸

If there is no wireless carrier providing service in a rural LEC’s service area, a rural LEC necessarily will not receive a “request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.”

Sprint Nextel must, however, oppose MSRI’s additional request that the Commission “clarify” that an incumbent LEC be able to excuse itself – unilaterally – from complying with its statutory portability obligation if *it* determines that the wireless carrier making a request provides a “viable, quality wireless service throughout (not just overlapping) a rural carrier’s service area.”¹³⁹ Whether a wireless carrier provides a “viable, quality” service should be determined by

¹³⁶ MSRI additionally claims there is a “lack of consumer demand” for intermodal portability. *See* MSRI Comments at 6.

¹³⁷ MSRI Comments at 13.

¹³⁸ 47 C.F.R. § 52.23(c).

¹³⁹ MSRI Comments at 13.

the market – that is, by consumers – and not by the incumbent against whom the wireless carrier is attempting to compete.

L. The Texas LEC “FCC Changed Interconnection Rules” Argument. The Texas Rural Carriers assert that the *Intermodal Order*’s “treatment of interconnection issues in the LNP context does not maintain the *status quo* of interconnection issues, but instead substantively impacts the obligations of the parties.”¹⁴⁰ The *Intermodal Order* could not have possibly changed existing interconnection rules, because the FCC expressly held that preexisting interconnection requirements “are outside the scope of this order.”¹⁴¹ Moreover, the Texas Rural Carriers neglect to mention that the FCC has already rejected this very assertion when the same Texas Rural Carriers made the same accusation in the appellate court:

But the obligation [the Texas Rural Carriers] describe is a product of the Commission’s long-standing interconnection rules (*i.e.*, the obligation to deliver traffic for termination). * * * Moreover, to the extent that the RTCs contest their obligations under the Commission’s interconnection and intercarrier compensation rules to deliver locally-rated calls outside of their rate centers (whether to ported or non-ported numbers), the time for direct review of those rules likewise has expired.¹⁴²

And, the Texas Rural Carriers further do not mention in their comments that the appellate court determined that it was they, not the FCC, who “wanted to impose new restrictions” on interconnection.¹⁴³

M. The Texas LEC “No Tandem Arrangement” Argument. Texas Rural Carriers claim that they cannot comply with the *Intermodal Order* because they do “not have transiting relationships with tandem operators” and it “*may* be difficult and expensive to obtain a transiting agree-

¹⁴⁰ Texas Rural Carrier Comments at 8.

¹⁴¹ *Intermodal Porting Order*, 18 FCC Rcd at 23713 ¶ 40.

¹⁴² Brief for Respondents, *Central Texas Telephone Cooperative, et al. v. FCC*, No. 03-1405. at 21 and 23-24 (D.C. Cir., filed June 24, 2004).

¹⁴³ *See Central Texas Telephone v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005).

ment.”¹⁴⁴ The Texas LECs make this argument even though Congress was clear that a LEC “*must take any action* under its control to provide interim or final number portability.”¹⁴⁵ The Texas LECs make this argument even though the Commission stated unequivocally nearly two years ago that it “expect[s] carriers that need to make technical modifications to do so forthwith.”¹⁴⁶ And finally, the Texas LECs make this argument even though another rural LEC paid a \$100,000 “contribution” to the U.S. Treasury because the Commission rejected the LEC’s argument that compliance with the porting rules “is infeasible because it would require traffic to be routed to a third party tandem access provider.”¹⁴⁷

N. The Iowa and Texas LEC Interconnection Agreement Argument. The Commission in the *Intermodal Order* determined that interconnection agreements were unnecessary and that requiring their execution as a precondition to porting would “undermine the benefits of LNP to consumers by prevents or delaying implement of intermodal porting.”¹⁴⁸ Although no LEC appealed this FCC decision, the Texas Rural Carriers now claim that the *Intermodal Order* “severely undermines the ability of wireline carriers to establish interconnection agreements with porting wireless carriers.”¹⁴⁹ The Rural Iowa Independent Telephone Association (“RIITA”) goes further, claiming that “negotiated” agreements “would solve” the porting disputes between rural LECs and wireless carriers.¹⁵⁰ Neither rural LEC group explains its position, however.

¹⁴⁴ Texas Rural Carriers Comments at 4 (emphasis added).

¹⁴⁵ USTA Further Reply Comments, CC Docket No. 96-116, at 7 n.4 (April 5, 1996), *quoting* S. Rep. No. 104-23, at 20 (emphasis added).

¹⁴⁶ *Intermodal Porting Order*, 18 FCC Rcd at 23709 ¶ 29.

¹⁴⁷ *CenturyTel Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 8543 at ¶ 17 (2004).

¹⁴⁸ *Intermodal Porting Order*, 18 FCC Rcd at 23711-12 ¶¶ 34-36.

¹⁴⁹ Texas Rural Carriers Comments at 3.

¹⁵⁰ RIITA Comments at 4.

The assertion that interconnection discussions would “solve” the long-standing disputes between the rural LEC and wireless sectors is not credible. Meaningful negotiations cannot possibly occur so long as rural LEC continue to ignore FCC rules affirmed on appeal. Nor is there any credibility to the assertion that the *Intermodal Order* “seriously undermines” interconnection agreements when agreements not unnecessary prior to porting. Besides, if any rural LEC truly believes that an interconnection agreement is important – whether porting is implemented or not – it only needs to ask the wireless carrier to commence negotiations.¹⁵¹

¹⁵¹ See 47 C.F.R. § 20.11(f); *Wireless Termination Tariff Order*, 20 FCC Rcd 4855 (2005).